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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. 633

CHARLES McLAURIN,

Petitioner,

—v.—

CITY OF GREENVILLE, MISSISSIPPI,

Respondent.

(Two Cases)

CHARLES EARL COBB,

Petitioner,

—v.—

CITY OF GREENVILLE, MISSISSIPPI,

Respondent.

(Two Cases)

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF MISSISSIPPI

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Petitioners pray that a writ of certiorari issue to review the judgment of the Supreme Court of Mississippi entered in the above-entitled cases on June 13, 1966. Rehearing was denied on July 8, 1966.

Opinions Below

The opinions of the Supreme Court of Mississippi are reported at —— Miss.——, 187 So. 2d 854, 860, 861 (1966) and are set forth in the Appendix, pp. 1a-13a, 15a, 17a, 19a *infra*. The judgments of the Supreme Court of Mississippi are set forth in the Appendix, pp. 14a, 16a, 18a, 20a, *infra*.

Jurisdiction

The judgments of the Supreme Court of Mississippi were entered June 13, 1966 (RA 220; RB 163; RC 174; RD 169).[1]

Jurisdiction of this Court is invoked pursuant to 28 U. S. C. §1257(3), petitioners having asserted below and asserting here deprivation of rights, privileges and immunities secured by the Constitution of the United States. Pursuant to Rule 23(5) of the Rules of this Court, a single petition for certiorari is filed seeking review of the four related judgments below.

Questions Presented

1. Two Negro girls had been tried in a segregated courtroom of the Greenville, Mississippi, Municipal Court for seeking to use an all-white municipal park. The trial had been attended by about 300 white and Negro spectators, and, as the spectators left the Municipal Building, petitioners

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[1] References herein to the record in McLaurin's breach of the peace case (No. 3429 below) are cited as RA; to McLaurin's resisting arrest case (No. 43498 below) as RB; to Cobb's breach of the peace case (No. 43436 below) as RC; and to Cobb's resisting arrest case (No. 43497 below) as RD.

Charles McLaurin and Charles Earl Cobb, Negro civil rights workers, successively mounted the steps in front of the building and protested the segregation and racial discrimination exemplified in the trial and conviction of the girls.[2] Neither petitioners nor any person in the crowd attempted or advocated violence or incited to riot. A large number of armed Greenville policemen were in and around the building. Apprehending that the crowd might become unruly, but without taking any steps to contain it, police arrested petitioners for speaking without a permit. Petitioners were later charged with, and convicted of, "disturb[ing] the public peace by loud or offensive language, or by conduct either calculated to provoke a breach of the peace, or by conduct which might reasonably have led to a breach of the peace," in violation of Miss. Code Ann. §2089.5 (Supp. 1964), which punishes any person "who disturbs the public peace, or the peace of others, by violent, or loud . . . or boisterous conduct or language, . . . or by conduct either calculated to provoke a breach of the peace, or by conduct which may lead to a breach of the peace, or by any other act . . . ." They were also charged with, and convicted of, resisting lawful arrest on evidence that, when seized by the arresting officers, they braced their feet and later went limp. On this record, do petitioners' convictions offend the First and Fourteenth Amendments to the Constitution of the United States because:

a. Petitioners were convicted for exercising their rights of free speech, assembly and petition?

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[2] The Supreme Court of Mississippi subsequently agreed with petitioners that the convictions of the girls were entirely lacking in evidentiary support and were unconstitutional under this Court's decision in *Wright* v. *Georgia*, 373 U. S. 284 (1963). See p. 8, n. 6, *infra*.

b. Petitioners were convicted upon no evidence of guilt?

c. Petitioners were convicted under a statute indistinguishable from that declared facially unconstitutional in *Cox* v. *Louisiana*, 379 U. S. 536, 551-52 (1965)?

2. Does petitioner Cobb's conviction for resisting arrest offend the Equal Protection Clause of the Fourteenth Amendment because the trial court refused to permit him to show a pattern or practice of systematic prosecutorial exercise of peremptory challenges to strike Negroes from the petit jury?

Constitutional and Statutory Provisions Involved

This case involves the First Amendment and Section 1 of the Fourteenth Amendment to the Constitution of the United States.

This case also involves the following statute of the State of Mississippi:

Miss. Code Ann. §2089.5 (Supp. 1964)—Disturbance of the public peace, or the peace of others.

1. Any person who disturbs the public peace, or the peace of others, by violent, or loud, or insulting, or profane, or indecent, or offensive, or boisterous conduct or language, or by intimidation, or seeking to intimidate any other person or persons, or by conduct either calculated to provoke a breach of the peace, or by conduct which may lead to a breach of the peace, or by any other act, shall be guilty of a misdemeanor, and upon conviction thereof, shall be punished by a fine of not more than five hundred dollars ($500.00), or by imprisonment in the county jail not more than six (6) months, or both.

This case also involves the following ordinance of the City of Greenville, Mississippi:

> Code of Ordinances of the City of Greenville, Section 252—Resisting Arrest.
>
> Any person who knowingly and wilfully opposes or resists any officer of the city in executing, or attempting to make any lawful arrest, or in the discharge of any legal duty, or who in any way interferes with, hinders or prevents, or offers or endeavors to interfere with, hinder or prevent, such officer from discharging his duty, shall be guilty of a misdemeanor.

Statement

Petitioners Charles McLaurin and Charles Earl Cobb, Negro civil rights workers, were arrested on July 1, 1963 in the City of Greenville, Mississippi and charged with breach of the peace, in violation of Miss. Code Ann. §2089.5 (Supp. 1964), set forth p. 4, *supra*, and with resisting arrest, in violation of a Greenville City ordinance, set forth p. 5, *supra* (RA 3; RB 8; RC 5; RD 6).

On July 3, 1963, petitioners were tried and convicted on these charges in the Municipal Court of the City of Greenville (187 So. 2d at 855; RA 206).

Petitioners appealed to the County Court of Washington County for trials *de novo* on their four charges. There, in four separate jury trials,[3] petitioners were again convicted

[3] Petitioner McLaurin was tried and convicted of breach of the peace on September 16, 1963 (RA 13); he was tried and convicted of resisting arrest on September 20, 1963 (RB 16). Petitioner Cobb was tried and convicted of breach of the peace on September 17, 1963 (RC 13-14); he was tried and convicted of resisting arrest on September 20, 1963 (RD 16).

and sentenced to pay a fine of $100.00 and serve a term of 90 days in the city jail on each charge.

Petitioners appealed their convictions to the Circuit Court of Washington County, which affirmed.[4] Appeals were allowed to the Supreme Court of Mississippi, where the four cases were consolidated for argument.[5]

On June 13, 1966, the Supreme Court of Mississippi affirmed petitioners' convictions in four separate orders, with an extensive opinion in the *McLaurin* breach of the peace case (187 So. 2d at 855-60; RA 206-19; RB 161-62; RC 173; RD 168). Petitioners' suggestions of error were overruled on July 8, 1966 (RA 222; RB 165; RC 176; RD 171).

In each of the four cases covered by this petition and others tried in the same court during the same week, counsel for petitioners attempted to show a pattern or practice of systematic prosecutorial exercise of peremptory challenges to strike Negroes from the petit juries. In the cases first tried—petitioners' breach of the peace prosecutions—counsel was permitted to state for the record the number of Negroes peremptorily excused by the prosecutor. In the Cobb resisting-arrest case, counsel tried to introduce the figures on Negro peremptory challenges which he had compiled "in these cases all during the week" (RD 24).

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[4] Petitioners' breach of the peace convictions were affirmed on February 27, 1964 (RA 106-07; RC 82-83); petitioners' resisting arrest convictions were affirmed on July 24, 1964 (RB 80; RD 87).

[5] After submission of the cases to the Supreme Court of Mississippi, it was discovered that the affidavits upon which the charges were based were not included in the records, although they had been designated by petitioners in their notice of designation of the record. Respondent City of Greeenville suggested a diminution of the record, which was sustained by the court, thereby correcting the omission. (—— Miss. ——, 180 So. 2d 927 (1965); 187 So. 2d at 855.)

The trial court disallowed this proffer on the stated ground that "This is a separate case altogether" (*Ibid.*). Counsel explained that "only [to] show what happened in one case would not be enough to prove systematic exclusion, but if we can show a pattern of what happened in enough cases, then we are in a better position to argue [the] contention" (RD 25). The court adhered to its ruling, stating:

> . . . Your motion is well in the record and your motion specifically states what you are seeking to do and the Court understands that and the record shows that, and if this Court is in error by not permitting you to show that pattern, then you don't have to show that pattern to the Supreme Court at all, the Supreme Court will reverse it because it didn't let you do it. Your record is all right for that purpose (RD 25-26).

Summary of the Evidence

The arrest of petitioners was precipitated by the trial of two Negro girls in the Municipal Court of the City of Greenville on July 1, 1963, on charges of disorderly conduct (App. p. 3a; 187 So. 2d at 856; RA 208). Petitioners attended the trial, along with about 150 other Negroes and an approximately equal number of whites. During the trial petitioner McLaurin attempted to sit on the side of the courtroom customarily reserved for whites, but he was ordered out of that section (RA 24, 30-33, 64, 75-76; RB 55-56, 65-66). Petitioner McLaurin left the courtroom and protested the segregated seating pattern to police chief W. C. Burnley (RA 208). His protest was futile, and he was then denied readmission to the courtroom (RA 208). Petitioners then left the Municipal Building, which housed the Municipal Court and the police station, and stood out-

side on the sidewalk waiting for the trial to end and for the spectators to emerge (RA 75-76).. About 50 Negroes were standing outside the building, having been denied admission to the courtroom because the Negro side was completely filled (although there was some space on the white side) (RA 76).

The girls were convicted by the Municipal Court.[6] As the spectators left the municipal building, petitioner McLaurin began to address them in a loud voice, protesting the conviction of the girls and the evils of segregation and calling for mass Negro voter registration to achieve equality (RA 78-79, 90, 92). Police officer Carson then arrested petitioner McLaurin (RA 209). Next, petitioner Cobb began to address the crowd in much the same vein as petitioner McLaurin, and he was arrested by police officer Martin (RC 30, 59-60).

Because the nature and content of petitioners' speeches and the context in which they were delivered are of crucial importance to decision of this case, the evidence adduced in these four cases will be summarized separately, as follows:

McLaurin Breach of the Peace Case

Arresting officer Carson testified that petitioner McLaurin loudly protested the Court's decision, saying that

[6] At their trial police officers testified that they were arrested and charged with disorderly conduct because they refused to leave a public park when the police ordered them to do so because police feared that, if they stayed, the white crowd that was gathering around them would become violent. Their convictions were subsequently reversed by the Mississippi Supreme Court in *Bolton* v. *City of Greenville*, 253 Miss. 656, 178 So. 2d 667 (1965) and *Bynum* v. *City of Greenville*, 253 Miss. 667, 178 So. 2d 672 (1965).

it was wrong, that segregation was wrong and that something should be done to right these wrongs (RA 25, 28, 36, 209). Apprehending that the crowd was becoming "tense" (RA 27, 209), Carson told McLaurin that he could not continue speaking without a permit (RA 28) and, when McLaurin continued, arrested him (RA 28). Police captain Harvey Tackett and police chief W. C. Burnley also testified for the City of Greenville. Captain Tackett was unclear as to the exact content of petitioner McLaurin's speech, but he recognized it as a speech of protest against segregation and a general query to the crowd as to what they were going to do about it (RA 45, 210). Chief Burnley was also near the scene and testified that McLaurin's speech included queries to the crowd: "What are you going to do? Are you going to let this happen? Statements of that type" (RA 54, 211).

None of the prosecution witnesses heard any profane language on the part of petitioner McLaurin (RA 36-37, 51-52), nor any call for violence (RA 37-38), nor was there any testimony that McLaurin's speech disturbed a court in session.

Petitioner McLaurin testified on his own behalf. He described the content of his speech as follows:

> I was saying different things like, this wouldn't have happened if Negroes were registered to vote, that in Washington County Negroes are in the majority of the population—50% of the population is Negro and that they could have used the park or any other thing had they been registered voters (RA 77, 213).
>
> . . . [T]he words that I was using wouldn't have caused them to jump—to go in there and try to beat up the

> Judge. Negroes know they can't go beat up the Judge and be justified, and tear down the building and be justified, or jump on a policeman in the State of Mississippi and be justified (RA 79, 213-14).

Petitioner McLaurin also testified as to what he intended by his speech:

> I meant that if they were registered—if the people would register to vote, were to get in line and exercise their duties and responsibilities as citizens, as Negro citizens, and as citizens of the United States, they could change some of these things. They could change the policy of being arrested in a park that they paid for as well [sic] any other people and that there wouldn't be such parks that was designated for whites and for Negroes. . . . And, the only thing that I had in mind was to get [the crowd] to register to vote and to realize what was happening, and I felt that I had a right to do this under the 1st Amendment (RA 78-79).
>
> • • • • •
>
> I was going to tell them what had taken place with respect to the park and with my being asked to leave the courtroom. That's what I was speaking of, I was speaking of the fact that the kids had been arrested because they used the public park that had been set aside for whites and the fact that I was thrown out of the courtroom because I had used the side that had been set aside for the whites on the right side of the building, you know (RA 92).

All three prosecution witnesses agreed that the predominantly Negro crowd of approximately 200 was "mumbling"

(RA 27, 42, 45-46, 57) and appeared upset, but no threat of violence, either directed at the speaker or at city authorities, was heard nor did anyone in the crowd appear to be armed (RA 42, 68). After the arrest of petitioners, the crowd was easily dispersed (RA 48; RD 47).

McLaurin Resisting Arrest Case

Officer Carson testified that, after he told petitioner McLaurin that he was under arrest, McLaurin kept addressing the crowd. Carson testified that he took McLaurin by the arm and then pushed him from behind into the police station (RB 33-34). McLaurin tried to brace his feet and "began to pull back" (RB 33), but offered no greater resistance to Carson, who outweighed him by 60 pounds (RB 38, 59). Once inside the police station, McLaurin fell to the floor and lay motionless there (RB 34). He was then picked up and carried to the sergeant's desk for booking, after which he voluntarily got up (RB 35).

McLaurin testified that after he had begun to speak, Carson came up to him and told him that he could not speak without a permit (RB 60). McLaurin continued to speak, and Carson took him by the arm and told him that he was under arrest (RB 60). Carson then pushed him from behind into the police station. While McLaurin did not struggle, he concededly made Carson supply the energy needed to propel him into the police station (RB 60-61). McLaurin admitted that, once inside the police station, he went limp (RB 61). His action, he testified, was equivalent to saying: "[H]ere's my body, it is you that wants me in jail, then, carry me to jail" (RB 68).

Cobb Breach of the Peace Case

Arresting officer James Martin testified that petitioner Cobb asked the crowd: "[A]re we going to stand for this, and watch my partner go to jail, what are you going to do about it?" (RC 30). Captain Tackett also testified as to what Cobb said:

> He said, you see what they are doing to him, are you going to stand here and let them do it? He said this is everybody's fight and so on (RC 43).

And police chief Burnley testified that Cobb said:

> Are you going to take this, they are taking him away to jail, let's all go to jail (RC 51).

But Martin and Burnley both admitted that Cobb did not encourage the crowd to commit any act of violence (RC 37, 55).

Petitioner Cobb testified that, after McLaurin had been arrested, he stood on the steps of the Municipal Building, "and I was telling them that the two girls had been arrested for using a public park paid for with your tax money. I said McLaurin has been taken to jail for trying to tell you about it, and that I think we all ought to be in jail with McLaurin" (RC 59). Cobb was told by Martin that he was under arrest for speaking without a permit (RC 59).

Cobb explained what he meant when he said, "I think we all ought to be in jail with McLaurin":

> [T]he point that I was trying to bring out to the people was that the two girls had not only been arrested illegally, but unjustly and that McLaurin had been arrested not only illegally but unjustly, and that

> if this was the kind of society and the kind of system that arrested people unjustly and illegally and called it legal and just, then I felt all the legal and just people should be in jail because I feel that in an illegal and unjust system and society, the real just people will wind up in jail simply because the unjust and illegal people will not tolerate any kind of honest or just thinking or actions (RC 60).

Petitioner Cobb did not intend his listeners to go to jail by committing violence, but intended that the crowd "just go on in voluntarily into the cells" (RC 62).

The prosecution witnesses testified that the crowd of about 200 was "angry" (RC 30) and "muttering" (RC 43, 52), but that no threat of violence emanated from the crowd (RC 52-53). There was no evidence that Cobb's speech disturbed a court in session. The crowd did nothing to hinder the arrest of petitioners, nor did the arresting officers fear such hindrance (RD 36).

Cobb Resisting Arrest Case

After Officer Martin told petitioner Cobb that he was under arrest for speaking without a permit (RD 32), he grabbed Cobb by the arm and dragged him into the police station (RD 33, 68). Officer Martin, outweighing petitioner Cobb by 100 pounds (RD 37), testified that Cobb "just put all his weight on me" (RD 33). Captain Tackett also testified as to what Cobb had done: "He was trying to back up, pushing back, and looking back over his shoulder, hollering, still shouting" (RD 46). After Cobb was pushed into the police station he went limp and was carried to the sergeant's desk for booking (RD 33). After

booking, Cobb voluntarily got up and walked to his cell (RD 34).

How the Federal Questions Were Raised and Decided Below

In the County Court of Washington County, petitioners preserved each of the issues presented here by a motion for directed verdict (RA 62-63; RB 52-53; RC 56-57; RD 64-65) and by a motion for new trial (RA 96-97; RB 16a-16b; RC 15-16; RD 17-18); these motions were denied (RA 63, 97; RB 53, 16b; RC 57, 16; RD 66, 18).

In the Circuit Court of Washington County, petitioners preserved each of the issues presented here in their assignments of errors (RA 104; RC 80).[7]

In the Supreme Court of Mississippi, petitioners preserved each of the issues presented here (RB 93; RC 101; RD 100).[8] The Supreme Court of Mississippi considered and determined on the merits each of the issues raised in this petition (App. pp. 2a-3a; 187 So. 2d at 855, 860-61; RA 207).

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[7] The assignments of errors in petitioners' resisting arrest cases were omitted from these records.

[8] The assignment of errors in McLaurin's breach of the peace case was mistakenly omitted from that record.

REASONS FOR GRANTING THE WRIT

I.

Certiorari Should Be Granted to Review and Reverse Petitioners' State Criminal Convictions, Which Punish Them for the Exercise of Their Federal Constitutional Rights of Free Speech, Assembly and Petition and Conflict With Decisions of This Court.

Petitioners were charged with "disturb[ing] the public peace by loud or offensive language, or by conduct either calculated to provoke a breach of the peace, or by conduct which might reasonably have led to a breach of the peace" (RA 3; RC 5). Petitioners submit that Mississippi may not constitutionally punish them pursuant to these charges for engaging in the type of conduct which this record reveals.

This record reveals that petitioners' conduct consisted solely of speech—speech, to be sure, of a vigorous and stirring nature—but constitutionally protected speech nonetheless. The speeches which petitioners gave were to a crowd of about 200 Negroes on the public sidewalk, most of whom had just left a segregated courtroom after witnessing the trial and conviction of two Negro girls for having sought to enjoy a white-only municipal park. They were speeches of protest designed to draw public attention to the evils of racial discrimination and segregation as practiced in the community. Petitioners intended to stir persons in the crowd to action, viz., assertion of their federal rights. The fact that petitioners were arrested before they could fully make their point about the necessity of Negroes registering to vote and exercising other federal rights does not

deprive them of federal protection. What petitioners did succeed in saying merely amounted to a call to action; but nowhere in the record is there any indication that it was a call to unlawful action. What petitioners said may have "brought about a condition of unrest", but it has long since been settled by this Court that a conviction resting on that ground may not stand. *Terminiello* v. *Chicago,* 337 U. S. 1, 5 (1949).

Petitioners could constitutionally be punished only if they intended to incite their listeners to riot or used language whose natural and foreseeable effect under the circumstances would provoke their listeners to acts of violence.[9] Thus, the central issue presented here is whether the design or content of petitioners' speech (analyzed in the context of the composition and mood of the crowd) exceeded the boundaries of protected free speech. Petitioners submit it did not.

The constitutional guidelines for decision here are provided by *Edwards* v. *South Carolina,* 372 U. S. 229 (1963) and *Cox* v. *Louisiana,* 379 U. S. 536 (1965). Analysis of these cases reveals that petitioners' speeches merit no less federal protection than that afforded the speeches delivered in *Edwards* and *Cox.*

In *Edwards,*

> the petitioners engaged in what the City Manager described as 'boisterous', 'loud', and 'flamboyant' conduct, which, as his later testimony made clear, consisted of listening to a 'religious harangue' by one of

[9] The record makes clear that no profane language was used by the petitioners. Nor is there any evidence in the record that petitioners disturbed a court in session.

> their leaders, and loudly singing 'The Star Spangled Banner' and other patriotic and religious songs, while stamping their feet and clapping their hands (372 U. S. at 233).

The speaker in *Edwards* had "harangued" approximately 200 of his followers and at least an equal number of bystanders on the State House grounds in Columbia, South Carolina. His and his followers' breach of the peace convictions were reversed by this Court, holding that their constitutionally protected rights of free speech, assembly and petition had been exercised "in their most pristine and classic form" (372 U. S. at 235).

Cox had addressed a group of about 2,000 young Negro students on the sidewalks between the State Capitol and the courthouse in Baton Rouge, Louisiana. His was a speech of protest (379 U. S. at 542-43):

> [Cox] gave a speech, described by a State's witness as follows:
>
> > He said that in effect it was a protest against the illegal arrest of some of their members and that other people were allowed to picket . . . and he said that they were not going to commit any violence, that if anyone spit on them, they would not spit back on the person that did it.
>
> Cox then said:
>
> > All right. It's lunch time. Let's go eat. There are twelve stores we are protesting. A number of these stores have twenty counters; they accept your money from nineteen. They won't accept it from the twentieth counter. This is an act of racial discrimination.

> These stores are open to the public. You are members of the public. We pay taxes to the Federal Government and you who live here pay taxes to the State.

The Sheriff testified that, in his opinion, constitutional protection for the speech ceased "when Cox, concluding his speech, urged the students to go uptown and sit in at lunch counters" (379 U. S. at 546), but this Court disagreed:

> The Sheriff testified that the sole aspect of the program to which he objected was '[t]he inflammatory manner in which he [Cox] addressed that crowd and told them to go on uptown, go to four places on the protest list, sit down and if they don't feed you, sit there for one hour.' Yet this part of Cox's speech obviously did not deprive the demonstration of its protected character under the Constitution as free speech and assembly (379 U. S. at 546).

The court below relied upon *Feiner* v. *New York*, 340 U. S. 315 (1951) (App. pp. 12a-13a; 187 So. 2d at 859-60; RA 218), but that case is no more applicable to this than it was to *Edwards* and *Cox*. Both *Edwards*[10] and *Cox*[11] distinguished *Feiner*, involving as it did a case where "the speaker passes the bounds of argument or persuasion and undertakes incitement to riot" (340 U. S. at 321).[12]

Analysis of the record reveals that the decision of the court below affirming petitioners' convictions conflicts with

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[10] 372 U. S. at 236.

[11] 379 U. S. at 551.

[12] Both *Edwards* and *Cox* also distinguished *Chaplinsky* v. *New Hampshire*, 315 U. S. 568 (1942), which involved "fighting words" on the part of the speaker.

Edwards and *Cox*. Here, petitioners neither intended to incite their listeners to riot, nor used language creating, under the circumstances, a clear and present danger of riot. Like the speakers in *Edwards* and *Cox*, petitioners intended to encourage their listeners to assert their federal rights. They intended to tell the crowd that if they registered to vote they could eradicate racial discrimination and segregation in the community. As in *Edwards* and *Cox*, the content of the speeches here was stirring and vigorous, but not suggestive of violence. Nor were the speeches disguised invitations to riot, subtly concocted to exploit an explosive situation.

Petitioners' listeners were far fewer in number than in *Edwards* and *Cox*—about 200 Negroes and a few whites—most of whom had just witnessed, in a segregated courtroom, the trial and conviction of two Negro girls for using a white-only, municipal park.[13] No one in the crowd was armed and no one gave any indication of committing an act of violence. More pointedly, following the arrest of petitioners, their listeners quietly went home. It is true that the crowd was "muttering" and appeared tense and upset. Such was also the case with a larger number of onlookers in *Cox* (379 U. S. at 543, 550). But here, as in *Cox*, that fact cannot justify suppression of petitioners' speech. Nor can this Court accept at face value the unsupported assertions of police witnesses that an imminent danger of breach of the peace existed. This Court must go behind that conclusionary testimony and "make an independent examination of the whole record" (*Edwards, supra*, 372 U. S. at 235, *and cases cited*). To fail to do so would increase the danger

[13] There is no evidence in the record that an appreciable number of persons hostile to petitioners' cause had been attracted to the scene.

of police officers suppressing speech according to their "calculations as to the boiling point of a particular person or a particular group, not an appraisal of the nature of the comments *per se*" (*Ashton* v. *Kentucky*, 384 U. S. 195, 200 (1966)).[14]

II.

Certiorari Should Be Granted to Review and Reverse Petitioners' State Criminal Convictions, Which Deprive Them of Their Liberty Without Due Process of Law Because Founded Upon No Evidence of Guilt.

Since in Part I, *supra*, it was shown that the record reveals no conduct of petitioners which the State of Mississippi has a right to prohibit as a breach of the peace, petitioners' breach of the peace convictions offend the due process clause of the Fourteenth Amendment because there is a total absence of evidence in the record that petitioners "disturb[ed] the public peace by loud or offensive language, or by conduct either calculated to provoke a breach of the peace, or by conduct which might reasonably have led to a breach of the peace" (RA 3; RC 5). *Thompson* v. *Louisville*, 362 U. S. 199 (1959); *Garner* v. *Louisiana*, 368 U. S. 157 (1961); *Taylor* v. *Louisiana*, 370 U. S. 154 (1962).

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[14] Even if the crowd had been disorderly, petitioners would still maintain that they could not be punished, since they had neither intended to provoke violence nor used language creating, under the circumstances, a clear and present danger of violence. At the very least, they could not be arrested until the police had first attempted to control or disperse the crowd. *Cf.* petitioners' refused instructions (RA 12; RC 12). Otherwise, petitioners' conduct could be declared "criminal simply because [their] neighbors have no self-control and cannot refrain from violence" (Chafee, *Free Speech in the United States*, 151 (1954), quoted in *Ashton* v. *Kentucky*, 384 U. S. 195, 200 (1966)). The court below appears to have taken a contrary view (App. p. 12a; 187 So. 2d at 859; RA 217-18).

Moreover, when petitioners' breach of the peace convictions fall, for reasons tainting petitioners' arrests, there is similarly no evidence to support the charge that petitioners, by attempting to brace their feet and later by going limp, resisted a police officer "in executing or attempting to make a lawful arrest" (RB 8; RD 6).[15]

III.

Certiorari Should Be Granted to Review and Reverse Petitioners' State Criminal Convictions Under a Statute Indistinguishable From That Declared Facially Unconstitutional by This Court in *Cox* v. *Louisiana*.

Petitioners stand convicted of violating Miss. Code Ann. §2089.5 (Supp. 1964), which punishes any person who disturbs the public peace or the peace of others by, *inter alia*, "conduct either calculated to provoke a breach of the peace, or by conduct which may lead to a breach of the peace." Other sorts of disturbances of the peace denounced by the statute are not implicated by petitioners' conduct,[16] and, in

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[15] The juries which convicted petitioners of resisting lawful arrest were correctly charged by the trial judge that petitioners could not be convicted unless they were found to have committed a breach of the peace in the arresting officer's presence (RB 9, 15; RD 7, 12, 13). See *Wright* v. *Georgia*, 373 U. S. 284, 291-92 (1963); *Shuttlesworth* v. *Birmingham*, 382 U. S. 87 (1965).

[16] Section 2089.5 punishes disturbance of the peace by any of the following acts: (a) violent or loud or insulting or profane or indecent or offensive or boisterous conduct or language; (b) intimidation; (c) conduct calculated to provoke a breach of the peace or which may lead to a breach of the peace, or (d) "any other act."

(a) The police testimony below establishes that petitioners' conduct was not violent, insulting, indecent or profane. Their speech was loud, but there is no showing that it was louder than necessary in order to reach a large outdoor audience. Nor is there any showing that it was offensive or boisterous under any test that could

any event, the trial court's charge permitted their conviction on a finding that they violated the quoted language without more.[17] For these reasons the convictions must be reversed under settled principles if the quoted language is unconstitutional.[18]

In *Cox* v. *Louisiana*, 379 U. S. 536, 551 (1965), this Court held virtually identical language "unconstitutionally vague in its overly broad scope." That decision made clear that earlier holdings of the Court, *Cantwell* v. *Connecticut*, 310 U. S. 296 (1940); *Edwards* v. *South Carolina*, 372 U. S. 229 (1963); *Henry* v. *City of Rock Hill*, 376 U. S. 776 (1964), upsetting breach of the peace convictions had rested not merely on the ground that the defendants' conduct in each case was within the scope of free expression protected by the First and Fourteenth Amendments, but also on the independent ground that, where invoked to punish acts of

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escape condemnation under this Court's decision in *Terminiello* v. *Chicago*, 337 U. S. 1 (1949).

(b) There is not the slightest suggestion of intimidation in the record.

(c) The incipient-breach-of-the-peace portions of the statute are those discussed in the text. Although the opinion of the Mississippi Supreme Court is not altogether clear on the point, it appears that these were the portions which that court believed petitioners had violated. See RA 215-216, 218-219.

(d) The provision relating to "any other act" is so patently vague and overbroad within the principles of *Thornhill* v. *Alabama*, 310 U. S. 88 (1940), as not to require further discussion here.

[17] See RA 6; RB 9; RC 7; RD 7.

[18] *Stromberg* v. *California*, 283 U. S. 359, 367-368 (1931); *Williams* v. *North Carolina*, 317 U. S. 287, 291-293 (1942); *Thomas* v. *Collins*, 323 U. S. 516, 529 (1945). Cf. *Shuttlesworth* v. *Birmingham*, 382 U. S. 87, 92 (1965).

public protest and demonstration, such vague conceptions as "calculated to provoke a breach of the peace" failed to meet those "[strict] standards of permissible statutory vagueness" which the Amendments demand when a State undertakes to regulate speech activity. *NAACP* v. *Button*, 371 U. S. 415, 432 (1963), and authorities cited; see also *Dombrowski* v. *Pfister*, 380 U. S. 479, 486-487 (1965). And in *Ashton* v. *Kentucky*, 384 U. S. 195, 200-201 (1966), the Court reaffirmed the principle of *Cox* that these vague incipient-breach-of-the-peace regulations are facially impermissible.

The court below distinguished *Cox* on the ground that "The factual situation involved in this case is entirely different. . . ." (App. p. 13a; 187 So. 2d at 860; RA 218-219.) Petitioners have shown in the preceding sections of this petition that the "factual situation" here is not materially different than that in *Cox*. But even if it were, the *ratio decidendi* below ignores the vital point that *Cox* did not turn solely on the facts there presented but upon the considered declaration by this Court that the statutory language challenged in *Cox* and substantially identical with that challenged here was unconstitutional on its face.[19] Obviously, then, the decision below is inconsistent with an applicable decision of this Court within the meaning of Rule 19(1)(a) governing the granting of certiorari. It is an important and dangerous decision because it frontally undercuts the protection of free expression which this Court

[19] Perhaps petitioners might be punished even under a facially unconstitutional statute if their conduct were the sort of "hard core" activity described in *Dombrowski* v. *Pfister*, 380 U. S. 479, 491-492 (1965). But on this record it is impossible to so characterize their conduct.

has recently and explicitly announced, and for this reason alone it imperatively requires review by this Court lest the reception of *Cox* by the state courts render this Court's opinion there a futile exercise. Cf. *Henry* v. *City of Rock Hill, supra.*

IV.

Certiorari Should Be Granted to Review and Reverse Petitioner Cobb's Conviction for Resisting Arrest Because His Right to Equal Protection of the Laws Was Violated by the Trial Court's Refusal to Permit Him to Show Systematic Exclusion of Negroes From the Petit Jury Through Prosecutorial Abuse of Peremptory Challenges.

In McLaurin's appeal, the Mississippi Supreme Court correctly found that counsel had been permitted to present such evidence as he had on the prosecutor's discriminatory use of peremptories (App. pp. 9a-10a; 187 So. 2d at 858; RA 21, 214). And it properly held that the evidence available at that time was inadequate to sustain the contention (App. pp. 9a-10a; 187 So. 2d at 858; RA 214-15). But in affirming Cobb's resisting-arrest conviction on authority of *McLaurin*, that court ignored the circumstance, plainly shown by the *Cobb* record as quoted below, that in this case counsel had for the first time sought to demonstrate the accumulated experience of the prosecutor's peremptory practice during the week's trials and had been refused the opportunity to do so:

> . . . Your motion is well in the record and your motion specifically states what you are seeking to do and the Court understands that and the record shows

that, and if this Court is in error by not permitting you to show that pattern, then you don't have to show that pattern to the Supreme Court at all, the Supreme Court will reverse it because it didn't let you do it. Your record is all right for that purpose (RD 25-26).

Petitioner Cobb contends that under *Swain* v. *Alabama*, 380 U. S. 202, 224 (1965), he was entitled to "show the prosecutor's systematic use of peremptory challenges against Negroes over a period of time." Assuredly, the period here was short, but it covered a series of related cases involving civil rights matters tried by the same prosecutor in the same court. The question raised is whether, in view of the difficulty of recording and preserving evidence with regard to the volatile practice of exercising peremptory challenges, the proffer made here was sufficient within *Swain*. This Court should grant certiorari to determine that question.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

Opinion of Supreme Court of Mississippi in McLaurin Breach of Peace Case

IN THE
SUPREME COURT OF MISSISSIPPI

No. 43,429

CHARLES McLAURIN,

—v.—

CITY OF GREENVILLE.

INZER, Justice:

Appellant, Charles McLaurin, was convicted on a charge of disturbance of the public peace in violation of Mississippi Code Annotated section 2089.5 (Supp. 1964) in the Municipal Court of the City of Greenville. He appealed to the County Court of Washington County, where he was tried *de novo* before a jury. This trial resulted in a conviction, and he was sentenced to pay a fine of $100 and serve a term of ninety days in the city jail. From this conviction, he appealed to the circuit court, wherein the conviction was affirmed. The circuit judge allowed an appeal to this Court because of the constitutional question involved.

When this case reached this Court, it was consolidated with three other cases for the purposes of argument and submission to the Court. They are Cause No. 43,436,

which is a similar charge against Charles Cobb; Cause No. 43,497, which is a charge against this same appellant, Charles McLaurin, for resisting arrest; and Cause No. 43,498, which is a similar charge against Charles Cobb. The cases will be disposed of by separate orders. After the cases were submitted, it was discovered that the affidavits upon which these charges were based were not a part of the record; although they had been so designated by appellants in their notice of designation of record. The attention of counsel for the City and appellants was directed to this defect. The City suggested a diminution of the record, which suggestion was sustained. The affidavits are now a part of the records in all four cases.

The appellant's assignment of errors is as follows:

I. The court below erred in affirming a judgment of conviction which punishes conduct in the exercise of the right of free speech guaranteed by the Fourteenth Amendment to the Constitution of the United States.

II. The court below erred in approving the refusal of the trial court to give appellant's instruction that the jury could not find appellant guilty of breach of the peace if the police officers had made no reasonable effort to calm or disperse appellant's audience.

III. The court below erred in affirming a judgment of conviction based upon no evidence of guilt.

IV. The court below erred in affirming a judgment of conviction under a statute so vague and indefinite as to permit the punishment of the exercise of the right

of free speech guaranteed by the Fourteenth Amendment to the Constitution of the United States.

V. The court below erred in approving the denial by the trial court of appellant's motion to quash the jury panel on the ground of systematic exclusion of Negroes therefrom through prosecutorial abuse of peremptory challenges.

The proof on behalf of the City is sufficient to show that on July 1, 1963, a large crowd of people were present at the Municipal Court in the City of Greenville where two Negro girls were being tried on a charge of disorderly conduct. The courtroom which is in the municipal building seats about 300 people, and it was filled to capacity. About one-half of the people in the courtroom were Negroes, and one-half were white. There was also a large crowd, consisting of mostly Negroes, on the outside of the courtroom. Appellant was present at the trial, but was not in the courtroom. He had gone into the courtroom prior to the trial and was directed to a seat by Officer Willie Carson; however, he did not sit where Officer Carson directed him to sit, and when Carson spoke to him about it, McLaurin protested that the courtroom was segregated. He then went out of the courtroom and protested to the chief of police about the courtroom being segregated. When he returned to enter the courtroom, it was filled to capacity, and he was not allowed to enter again.

The trial resulted in the conviction of the two girls being tried, and most of the people then departed from the courtroom. Thereafter, although court was still in

session, McLaurin went outside the building and after talking with some of the people who were present at the trial, he began to shout in a loud voice, attracting the attention of the people who were leaving, and many turned and came back. He backed up on the steps of the building, and in a loud voice began exhorting the crowd of about 200 people, mostly Negroes, which had gathered around him in front of the building. The crowd blocked the sidewalk all the way to the street and the entrances to the building. Officer Carson was on the outside of the building after the trial, and he testified that the crowd around McLaurin appeared to be upset over the outcome of the trial. Officer Carson is a Negro and had been employed on the police force in the City of Greenville for over thirteen years prior to the trial. He holds the rank of detective and has had experience as a military policeman in the armed forces. He said that McLaurin said in a loud voice, "What you people going to do about this; this is wrong, the White Caucasian, this law is wrong; you going to take it; you going to let them get away with it." The crowd began to mutter and say that it wasn't right. It appeared to Officer Carson that the situation was very tense and anything could happen. It was his opinion that McLaurin was exciting the crowd in order to get them to do something about the court's decision. Carson made his way through the crowd to where McLaurin was standing and told him he would have to stop, and that he could not block the sidewalk. McLaurin continued to talk, and once again Carson told him to stop. McLaurin refused, and Carson placed him under arrest. After he was arrested, McLaurin kept pulling back and talking over

Carson's shoulder to the crowd, saying, "He's arresting me, what are you going to do about it." In order for Carson to get McLaurin into the building and out of the crowd, it was necessary for him to use all of his strength.

Captain Harvey Tackett, also a member of the City Police Force, was in front of the police station after the trial. He said that the first time he saw McLaurin, he was in the middle of the sidewalk in front of the station, and McLaurin started waving his arms and shouting in a loud voice to the people that were leaving. Most of the people immediately came back and gathered around McLaurin who then "jumped" upon the steps of the building and continued to shout and holler, asking the people what they were going to do about what had happened. The crowd started mumbling and saying something that he could not understand, but they appeared to be agreeing with McLaurin. It was his opinion that the crowd was about to take the situation into their own hands, and he thought that a breach of peace was imminent. He had had long experience in police work, and it was his opinion that McLaurin would have to be removed or there would likely be a riot. He started over to where McLaurin was standing, but before he reached him, Officer Carson reached McLaurin and said something to him, which Captain Tackett could not hear. McLaurin kept shouting and hollering and waving his arms, and Carson said something else to him; however, McLaurin continued shouting. Then he saw Carson take McLaurin by the arm and forcibly carry him inside the building. During this time McLaurin was still shouting to the crowd.

Chief of Police W. C. Burnley was also present at the scene and saw and heard what transpired. He had been

on the police force in Greenville for seventeen years and was a graduate of the FBI National Academy. He had received special training in methods relative to dealing with crowds. It was his opinion that the situation on the outside of the building was very tense. He saw McLaurin "jump" to the steps of the building and begin to shout and wave his arms in an emotional manner. He saw the people gather around him and many that were leaving turned and came back. He heard McLaurin shout, "Are you going to take this; what are you going to do about it," repeating these words over and over and other statements that he could not remember. It was his opinion that the speech of McLaurin was having an emotional effect upon the already tense crowd, and that any moment a riot or some other violence could take pace.

Charles Cobb who was a Field Secretary employed by the Student Non-violent Co-ordinating Committee testified in behalf of appellant. It was his testimony that he saw McLaurin when he entered the courtroom and saw Officer Carson go up to him and say something. McLaurin then left, and Cobb went out to ascertain why McLaurin had left. He went with McLaurin to protest to Chief Burnley relative to segregation in the courtroom, and when they returned, they were not allowed to enter the courtroom. When the trial was over, he left McLaurin and went outside. When he next saw McLaurin he was standing on the sidewalk saying something to the people gathered there. He estimated that there were about 100 Negroes on the sidewalk in front of the municipal building. As McLaurin was talking he backed up the steps of the building, and although

he was only twenty to thirty feet from McLaurin, he said he could not hear what McLaurin was saying. He saw one of two police officers say something to McLaurin, who continued talking. The officers then carried McLaurin into the municipal building. It was his opinion that the crowd did not appear to be so upset that they would do anything violent; he thought that they were mostly curious.

Appellant testified in his own behalf and said that he had been in Greenville off and on for about nine and one-half months. He was a Field Secretary for the Student Non-violent Co-ordinating Committee, and had been engaged in voter registration work during the time he had been in Greenville. He was also affiliated with other groups engaged in civil rights work, including a group of which the two Negro girls being tried were members. When he first went into the courtroom, he was directed to take a seat on the right side of the room, but he saw a vacant seat on the left side and sat there. He assumed that since he was directed to the right side where the Negroes were sitting that the left side was reserved for whites. After he sat down, Officer Carson told him he could not sit there. He asked Carson whether the courtroom was segregated, and Carson told him to come to the back of the room with him. He followed Carson out of the courtroom, but Carson didn't say anything else to him. He and Charles Cobb went to talk with Chief Burnley about the courtroom being segregated, and Burnley told them that they were in the room once, and turned and walked away from them. He was not allowed to re-enter the courtroom, and stayed outside during the trial. After the trial, he then walked outside of the

municipal building and began talking with some of the people who were present at the trial. He moved to the front of the building, and it appeared to him that the people coming out were shocked by the conviction of the girls. He said he started trying to get the attention of the crowd to tell them about registering and voting so that this kind of thing could not happen. Officer Carson then came up and told him that he could not make a speech without a permit, and when he continued to talk, Carson arrested him and carried him inside the building. He said, "I was saying different things like, this wouldn't have happened if Negroes were registered to vote, that in Washington County Negroes are in the majority of the population—50 per cent of the population is Negro and that they could have used the park or anyother (sic) thing had they been registered voters." He was asked whether the crowd appeared angry and in a tense and angry mood, and he replied, "I feel that the crowd was sorta upset as to the out come (sic) of the trial, but certainly the words that I was using wouldn't have caused them to jump—to go in there and try to beat up the Judge. Negroes know they can't go beat up the Judge and be justified, and tear down the building and be justified, or jump on a policeman in the State of Mississippi and be justified." On cross-examination, he admitted that during the entire time he had been in Greenville he had not been interfered with in any way in his voter registration work. He said Negroes were allowed to register without interference, although some did not pass the test. Most of his work had been with groups under the voting age, and he had not been interfered with in any way in this work.

Opinion of Supreme Court of Mississippi in McLaurin Breach of Peace Case

We will first address ourselves to the question of whether the circuit court was in error in affirming the action of the trial court, in overruling a motion of appellant to quash the jury panel on the ground of systematic exclusion of Negroes therefrom through prosecutorial abuse of peremptory challenges. Appellant contends that the trial court refused to allow him to show a pattern or practice of systematic exclusion by peremptory challenges by the City. This contention is not supported by the record in this case. The record reflects that the trial judge did at first deny appellant's motion to be allowed to show that the City had peremptorily challenged two Negroes, but immediately thereafter, she rescinded that ruling and granted appellant's motion. Appellant offered no further evidence in support of the motion to show that the City had followed the practice of systematically excluding Negroes by means of peremptory challenges. After the jury was selected, appellant made a motion to quash the panel because of systematic exclusion of Negroes therefrom because of race and color. He does not contend that the evidence in the record is sufficient to show a prosecutorial abuse of the peremptory challenges, but contends that this case should be remanded to give the appellant an opportunity to explore this matter further. There is no merit in this contention. In this connection, it is interesting to note that in Cause No. 43,498, which involves an appeal from McLaurin from a conviction on a charge of resisting arrest, wherein the City did not exercise its peremptory challenges to excuse Negroes from the jury panel, appellant made a motion to quash the panel because of systematic inclusion of Negroes. This position

taken by appellant is without merit and deserves no further discussion. *Swain* v. *Alabama*, 380 U. S. 202, 85 Sup. Ct. 824, 13 L. Ed. 2d 759 (1965).

The question of whether appellant's conduct in this case is protected by the First and Fourteenth Amendments to the Constitution of the United States presents the important question. It is appellant's contention that his speech was merely a protest against segregated conditions in Greenville and the fact that it made the crowd restive and angry does not support a conviction for a breach of public peace. In support of this condition, he cites and relies upon the case of *Terminiello* v. *Chicago*, 337 U. S. 1, 69 Sup. Ct. 894, 93 L. Ed. 1131 (1949). *Terminiello* was convicted of a violation of a city ordinance forbidding any breach of peace. The decision turned on the construction placed upon the ordinance by the trial court as reflected by the instructions to the jury. The court held that the construction was as binding upon it as though the precise words had been written into the ordinance. The conviction was reversed because the ordinance as construed by the Illinois court was at least partly unconstitutional. Appellant contends that he has been convicted of expressing unpopular views, and the construction of Mississippi Code Annotated section 2089.5 (Supp. 1964) by the trial court comes within the rule announced in *Terminiello, supra*. This directs our attention to the construction placed upon the statute by the trial court. This is reflected by the instructions to the jury as requested by the City and by the appellant. The court instructed the jury that if appellant was arrested for public protest against racial segregation, then they could not find

the defendant guilty. The trial court recognized that section 2089.5 could not be applied to restrict appellant's constitutional right to protest against racial segregation, and that this statute could not be used to infringe upon the constitutional right of appellant or any other person to speak freely within the framework of the law. This Court is fully cognizant of our duty to construe our statutes in such a manner to be sure that they will not infringe upon the constitutional rights of any person. The statute as construed by the trial court is not unconstitutional.

Appellant also urges that section 2089.5 is so vague and indefinite as to permit the punishment of the exercise of the right of free speech guaranteed by the Fourteenth Amendment to the Constitution of the United States. His argument is based upon the contention that as applied here the term "breach of peace" reaches federally protected activities that create unrest in others. The statute as drawn is in broad terms, but it is not unconstitutional upon its face. It is true that it could be construed in such a manner that it would reach federally protected activities, but we are well aware of the fact that neither this statute nor any other statute may be constructed so as to infringe upon the state or federally protected constitutional rights of appellant or any other person. This is evidenced by many decisions of this Court, including our decision in the case relative to the two girls whose conviction resulted in this action. *Bolton* v. *City of Greenville*, 253 Miss. 656, 178 So. 2d 667 (1965); *Bynum* v. *City of Greenville*, 253 Miss. 667, 178 So. 2d 672 (1965).

Opinion of Supreme Court of Mississippi in McLaurin Breach of Peace Case

We find no merit in the assignment of error relative to the refusal of the trial court to grant appellant an instruction to the effect that the jury could not find appellant guilty of a breach of peace if the police officer made no reasonable effort to calm or disperse the crowd. We do not understand the law to be that when an officer is faced with a situation such as Officer Carson was confronted with in this case, where there was a clear and present danger of a riot or disturbance of court then in session, that such officer must, before arresting the person who is creating the danger, attempt to disperse the crowd. Such an attempt might well trigger the imminent danger, and in such cases, the officer must use his best judgment in determining the means or manner in which to prevent the threatened danger. The arrest of appellant and the subsequent arrest of Charles Cobb enabled the officers to control the situation that otherwise might have created a riot beyond control. The factual situation in this case is somewhat similar to the facts in the case of *Feiner* v. *New York*, 340 U. S. 315, 71 Sup. Ct. 303, 95 L. Ed. 295 (1951), wherein the court quoted from *Cantwell* v. *Connecticut*, 310 U. S. 296, 60 Sup. Ct. 900, 84 L. Ed. 1213 (1940), where it is said:

> The language of *Cantwell* v. *Connecticut*, 310 U. S. 296 (1940), is appropriate here. 'The offense known as breach of the peace embraces a great variety of conduct destroying or menacing public order and tranquility. It includes not only violent acts but acts and words likely to produce violence in others. No one would have hardihood to suggest that the principle of

freedom of speech sanctions incitement to riot or that religious liberty connotes the privilege to exhort others to physical attack upon those belonging to another sect. When clear and present danger of riot, disorder, interference with traffic upon the public streets, or other immediate threat to public safety, peace, or order, appears, the power of the State to prevent or punish is obvious.' 310 U. S. at 308. . . . (340 U. S. at 320, 71 Sup. Ct. at 306, 95 L. Ed. at 300.)

The factual situation involved in this case is entirely different from the situation involved in the cases of *Cox* v. *Louisiana*, 379 U. S. 85 Sup. Ct. 453, 13 L. Ed. 2d 471 (1965), and *Wright* v. *Georgia*, 373 U. S. 284, 83 Sup. Ct. 1240, 10 L. Ed. 2d 349 (1963), and these cases do not control.

Appellant's contention that there was no evidence of appellant's guilt of the charge is without merit. This contention is based solely upon the proposition that appellant's acts were constitutionally protected, and we hold that they were not for the reasons heretofore stated.

We have carefully considered all the questions raised by the appellant in this case, and we are of the opinion that there was ample evidence from which the jury could find that appellant was guilty of the offense charged. The constitutional rights of the appellant were fully protected, and this conviction must be affirmed.

Affirmed.

All justices concur.

Judgment of Supreme Court of Mississippi in McLaurin Breach of Peace Case

Monday, June 13, 1966, Court Sitting

43,429

CHARLES MCLAURIN,

vs.

CITY OF GREENVILLE.

This cause having been submitted at a former day of this Term on the record herein from the Circuit Court of Washington County and this Court having sufficiently examined and considered the same and being of the opinion that there is no error therein doth order and adjudge that the judgment of said Circuit Court rendered in this cause on the 16th day of September 1963—a conviction of disturbance of the peace violation of Section 2089.5 Mississippi Code Annotated—and a sentence to pay a fine of $100.00 and to serve 90 days in jail be and the same is hereby affirmed. It is further ordered and adjudged that the appellant, Charles McLaurin, do pay the costs of this appeal to be taxed.

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Opinion of Supreme Court of Mississippi in McLaurin Resisting Arrest Case

IN THE

SUPREME COURT OF MISSISSIPPI

No. 43,498

CHARLES MCLAURIN,

v.

CITY OF GREENVILLE.

INZER, *Justice*:

Appellant, Charles McLaurin, was convicted in the Municipal Court of the City of Greenville on a charge of resisting arrest in violation of a city ordinance. Upon appeal to the County Court of Washington County, he was tried *de novo* by a jury and this trial resulted in a conviction, and he was sentenced to pay a fine of $100 and serve ninety days in the city jail. He appealed to the circuit court, wherein the conviction was affirmed. The circuit judge allowed an appeal to this Court because of the constitutional question involved.

Appellant does not contend that he did not resist arrest, but does contend that his arrest was unlawful. He urges that he was arrested for exercising his constitutional right of free speech guaranteed by the Fourteenth Amendment to the Constitution of the United States. We held in Charles McLaurin v. City of Greenville, Cause No. 43,429, this day decided, that his arrest was not unlawful and was not in violation of his constitutional right.

We also settled the other question raised on this appeal in that decision; therefore, this cause must be affirmed.

Affirmed.

All justices concur.

Judgment of Supreme Court of Mississippi in McLaurin Resisting Arrest Case

Monday, June 13, 1966 Court Sitting

No. 43,498

CHARLES MCLAURIN,

vs.

CITY OF GREENVILLE.

This cause having been submitted at a former day of this Term on the record herein from the Circuit Court of Washington County and this Court having sufficiently examined and considered the same and being of the opinion that there is no error therein doth order and adjudge that the judgment of said Circuit Court rendered in this cause on the 24th day of July 1964—a conviction of resisting arrest and a sentence to pay a fine of $100.00 and to serve a term of 90 days in jail—be and the same is hereby affirmed. It is further ordered and adjudged that the appellant, Charles McLaurin do pay the costs of this appeal to be taxed.

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Opinion of Supreme Court of Mississippi in Cobb Breach of Peace Case

IN THE
SUPREME COURT OF MISSISSIPPI

No. 43,436

CHARLES COBB,

v.

CITY OF GREENVILLE.

INZER, *Justice*:

This case is controlled by our decision in the case of McLaurin v. City of Greenville, Cause No. 43,429, this day decided. For the reasons stated therein, this case must be affirmed.

Affirmed.

All justices concur.

Judgment of Supreme Court of Mississippi in Cobb Breach of Peace Case

Monday, June 13, 1966, Court Sitting

43,436

CHARLES EARL COBB,

vs.

CITY OF GREENVILLE.

This cause having been submitted at a former day of this Term on the record herein from the Circuit Court of Washington County and this Court having sufficiently examined and considered the same and being of the opinion that there is no error therein doth order and adjudge that the judgment of said Circuit Court rendered in this cause on the 18th day of September 1963—a conviction of breach of the peace and a sentence to pay a fine of $100.00 and to serve a term of 90 days in jail—be and the same is hereby affirmed. It is further ordered and adjudged that the appellant, Charles Earl Cobb, do pay the costs of this appeal to be taxed.

Minute Book "BN" Page 398

Opinion of Supreme Court of Mississippi in Cobb Resisting Arrest Case

IN THE
SUPREME COURT OF MISSISSIPPI

No. 43,497

CHARLES COBB,

v.

CITY OF GREENVILLE.

INZER, *Justice*:

This case is controlled by our decisions in the cases of Charles McLaurin v. City of Greenville, Cause Nos. 43,429 and 43,498. For the reasons stated therein, this case is affirmed.

Affirmed.

All justices concur.

Judgment of Supreme Court of Mississippi in Cobb Resisting Arrest Case

Monday, June 13th, 1966, Court Sitting

43,497

CHARLES EARL COBB,

vs.

CITY OF GREENVILLE.

This cause having been submitted at a former day of this Term on the record herein from the Circuit Court of Washington County and this Court having sufficiently examined and considered the same and being of the opinion that there is no error therein doth order and adjudge that the judgment of said Circuit Court rendered in this cause on the 24th day of July 1964—a conviction of resisting arrest and a sentence to pay a fine of $100.00 and to serve a term of 90 days in jail—be and the same is hereby affirmed. It is further ordered and adjudged that the appellant, Charles Earl Cobb, do pay the costs of this appeal to be taxed.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. 633

CHARLES McLAURIN,

Petitioner,

vs.

CITY OF GREENVILLE, MISSISSIPPI

Respondent.

(Two Cases)

CHARLES EARL COBB,

Petitioner,

vs.

CITY OF GREENVILLE, MISSISSIPPI

Respondent,

(Two Cases)

REPLY BRIEF OF RESPONDENT

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In The

Supreme Court of the United States

October Term, 1966

No. 633

Charles McLaurin,

Petitioner,

vs.

City of Greenville, Mississippi

Respondent.

(Two Cases)

Charles Earl Cobb,

Petitioner,

vs.

City of Greenville, Mississippi

Respondent.

(Two Cases)

REPLY BRIEF OF RESPONDENT

Supplemental Facts

Respondent's position in the City Court, in the County Court of Washington County, in the Circuit Court of Washington County, in the Supreme Court of Mississippi, and in this Court has been and is, purely and simply, that the petitioners were guilty of conduct calculated to provoke a breach

of the peace or which might reasonably have lead to a breach of the peace. Stated another way, petitioners were arrested and prosecuted, not because of *what* they were saying, but because of the *effect* of their speeches upon the crowd—a crowd characterized by petitioners' own attorney as a "mob." (RB 51)

The issue squarely presented by this petition for a writ of certiorari is: Have the four state courts which have considered the charges against petitioners and which have considered whether petitioners' actions are protected by the First Amendment decided this question in a way probably not in accord with applicable decisions of this court?

Essentially, this is a question of fact. It may be helpful at this point to review briefly the Mississippi procedure under which two separate courts and four separate juries held hearings on the merits and found adversely to petitioners.

The City Court is not a court of record. The City Judge, appointed by the City Council, sits as an ex officio Justice of the Peace. In criminal trials, the City does not utilize the services of a city attorney, while defendants may or may not be represented by counsel, as they desire. In that court, petitioners were convicted under an affidavit charging that they

> "* * * did then and there use loud and offensive talk and other conduct causing a threatened breach of the peace * * *"

RA 150, 152.

They appealed to the County Court of Washington County.

The County Court, an intermediate court, is a court of record, and has limited jurisdiction concurrent with the Circuit and Chancery Court. On appeal of a criminal case from the City Court, there is a complete trial *de novo* before a

judge and jury. §1202, Mississippi Code of 1942 (Recompiled), provides that on trial of an appealed case,

> "* * * the affidavit charging the offense and other proceedings may be amended at any time before a verdict, so as to bring the merits of the case fairly to trial on the charge intended to be embraced in the affidavit."

On appeal, the affidavits were amended to conform with §2089.5, Mississippi Code of 1942 (Recompiled) (RA 3, RC 5), and §252, Code of Ordinances of the City of Greenville (Rev. Ed., 1938) (RB 7, RD 5), and the basic charge on which petitioners were tried in the County Court was that they did

> "* * * disturb the public peace by loud or offensive language, or by conduct either calculated to provoke a breach of the peace, or by conduct which might reasonably have led to a breach of the peace."

RA 3, RC 5.

There were four separate trials in County Court and four separate juries. Each of the petitioners was first tried on the breach of the peace charge, and then tried upon the resisting arrest charge. In the second of these trials, it was first necessary to prove and to have the jury find that there was a lawful arrest on the breach of the peace charge, so that in point of fact, each petitioner was found guilty of conduct provoking a breach of the peace or which might reasonably lead to a breach of the peace by two separate juries.

It is interesting to note that on the first trial, each petitioner moved to quash the jury panel on the ground that Negroes had been systematically *excluded* by use of peremptory challenges (RA 22, RC 25); on each of the second trials, petitioners moved to quash the jury panel on the ground that negroes had been systematically *included*! (RB 23, RD 24).

Again, procedure is important, and should be considered by this Court in its independent investigation to determine whether petitioners' First Amendment right were violated.

On each breach of the peace charge, the jury was instructed by the County Court as follows:

> "The Court instructs the jury that if you believe from the evidence in this case beyond a reasonable doubt that (Petitioner) * * * did, on or about 1 July 1963, within the corporate limits of the City of Greenville, Washington County, Mississippi, disturb the public peace by loud or offensive language, or by conduct either calculated to provoke a breach of the peace, or by conduct which might reasonably have led to a breach of the peace, then it is your sworn duty to return the following verdict: 'We, the jury, find the defendant guilty as charged.'"

RA 6, RC 7.

On each resisting arrest charge, substantially the same charge was given except that the last clause was replaced with this language:

> "* * * in the presence of the arresting officer, and that he was thereupon placed under arrest, such arrest was lawful."

RB 9, RD 7.

In each of the four trials, the County Court instructed the jury as follows:

> "The Court instructs the jury for the defendant that if you find that the defendant was arrested for peaceful protest against racial segregation, then you cannot find the defendant guilty."

RA 9, RB 14, RC 9, RD 14.

In each of the resisting arrest cases, the jury was instructed:

"The Court instructs the jury for the defendant that if you find the arrest itself was illegal then you cannot find the defendant guilty of resisting arrest."

RB 15, RD 12.

These petitioners, then, were given a trial on the merits before the City Court and found guilty of talk or conduct which threatened a breach of the peace; each petitioner was tried before two separate juries, and each guilty verdict, under the instructions given by the County Court, constituted an affirmative finding of fact that: (1) petitioners were guilty of conduct which might reasonably have led to a breach of the peace; and, more important, (2) that the petitioners were not arrested for a peaceful protest against racial segregation.

Notwithstanding that the City Judge and four separate juries (two all-white juries and two bi-racial juries) have agreed that petitioners were prosecuted, not for the *content* of their speeches, but for the calculated effect upon the "mob", this Court properly should review the evidence for an independent determination of whether petitioners have been denied constitutionally guaranteed rights.

For a proper understanding and evaluation of the evidence in this case, it is necessary to examine the setting within which the action occurred. It is an unfortunate fact that the State of Mississippi, at the time of these occurrences had a public image in the field of civil rights which was, to say the least, rather shabby. This is not true of the respondent City of Greenville.

See: *A Report on Equal Protection in the South,* U. S. Commission on Civil Rights (November, 1965), pp. 94-97; RA 154-157; Appendix A.

The cited portion of the Civil Rights Commission report must be accepted as an impartial assessment, and because it imparts an accurate image of the respondent City of Greenville, for the convenience of the Court is as reproduced as Appendix A to this brief. Respondent is proud of its record of impartiality and fairness and of the fact that each individual has been and is accorded his constitutional rights without regard to race, creed, color or national origin, whether or no that individual is a resident citizen.

Petitioners are professionals in the civil rights field. They are Field Secretaries of the Student Non-Violent Coordinating Committee (SNCC) (RA 83, RC 64), which this Court judicially knows to be one of the more militant of the civil rights organizations, and an advocate of "Black Power." Petitioner McLaurin had been active as a SNCC worker in Greenville since September of 1962 (RA 82); Petitioner Cobb since November of 1962 (RC 63). Respondent *never* interfered with their activities (RC 73). The main thrust of the SNCC program was voter registration. When petitioners arrived in Greenville, their investigation into voter practices revealed that whites and Negroes were treated alike in registration, that there was a substantial number of qualified Negro voters, that there were no organizations of any kind to hinder or keep Negroes from registering or voting, and that poll taxes—then a prerequisite to voting—could be paid, not only at the county courthouse, but at every bank and branch bank in the county and at all outlying communities by white and Negro alike. (RC 64, 65)

This being true, petitioners turned their efforts in other directions—to sit-ins and park demonstrations. The majority

of the residents with whom petitioners worked were under 18 years of age (RA 85, 86). Petitioners had engineered the park demonstrations of the two young girls who were being tried in Municipal Court, and that was their interest in being present (RD 75, 76, RA 84). These same park demonstrations had very nearly erupted into a riot.

See: *Bolton v. City of Greenville*, 253 Miss. 656, 178 So2d 667 (1965).

We think these facts pertinent in that they bolster the jury findings that petitioners were not arrested for a peaceful protest against segregation. It is not likely, as a matter of common sense, that petitioner McLaurin was making a speech about voter registration, and it is significant that even he never testified he actually said anything about registering protest with the mayor, or about remedying the situation through voter registration; this is what he was "going to say" (RA 77), what he "meant by his language" (RA 78), and what he "had in mind" (RA 90). He was talking in a "very loud, very loud" (RA 26) voice.

Petitioner McLaurin *knew* the temper of that crowd which was peacefully dispersing at the conclusion of the trials (RA 51, RB 28, RC 49, RD 55, 61). To use his own words,

> "* * * I felt that if it was a tense situation out there that these people would—first of all they knew, some of them, that the kids had tried to use the park. They needed some kind of idea as to what steps to take. They were up-set; they were restless. The expressions on their faces characterized by restless energy, that they felt that something should be done. *But, then all it needed was a leader*, and I was going to try and show them where they could register their protest with the Mayor, and I didn't

feel that they were going to come up and attack me." (Emphasis added) RB 58.

Regardless of what he "meant" or "had in mind" or what he was "going to say," what he actually did say, taken from his own testimony, was:

Q. And, you were asking these people, what are you going to do about it, were you not?

A. I was asking them—first of all I was asking them if they were satisfied, and yes, what were they going to do about it.

Q. You did ask them what they were going to do about it?

A. I did.

Q. You asked them if they were going to stand for it, did you not?

A. Yes, I said are you going to stand for it.

Q. So that the testimony what (sic) the officers gave in your presence here in the Courtroom as to what you said so far as it went is correct, is it not?

A. As far as they said that they heard. I said—I think that what Officer Tackett said that he only caught these very two things, I said other things before that and after.

Q. Do you deny that you said anything that the officers testified in this trial said you said?

A. No.

Q. Do you admit it?

A. I admit that I said, are you going to stand for segregation, are you going to stand this, or are you going to take it?

Q. Now then, you were making those statements to a crowd of people that you knew to be up-set and shocked, is that correct?

A. I was making a statement to people—let it fall on the ears of people that would listen.

Q. And, you knew that they seemed to be up-set and shocked?

A. Yes.

RB 66.

In their brief, petitioners characterize the speeches as "of a vigorous and stirring nature" (p. 15) which "merely amounted to a call to action." (p 16) We submit petitioners correctly state the case on page 15 of their brief with the statement, "Petitioners intended to stir the persons in the crowd to action, * * *"

The question is, what action?

It is a fair inference that the unusually large crowd attending the trial of the girls for participation in the park demonstration was present as a result of SNCC efforts and for the purpose of giving the defendants support. Petitioners were "affiliated" with the girl demonstrators (RA 84). Their interest in the trial as field secretaries of SNCC was the reason for petitioners' presence (RC 76). It would therefore be fair to conclude that the 200-300 members of the crowd were citizens with whom petitioners had worked, or at least sympathetic to their cause. Nevertheless, not one single witness was produced from that crowd to substantiate petitioners' contention that the speech had anything whatsoever to do with encouraging voter registration, or lodging a protest with the Mayor.

We respectfully submit that use of the language admitted by petitioners, in a loud, emotional manner, directed at a crowd of up-set, emotional shocked persons, charged with a restless energy, was indeed a call to action; more nearly, it was like tossing lighted matches at a pan of gasoline.

The officers involved were competent, experienced, impartial, professional law enforcement officers.

See: *A Report on Equal Protection in the South*, U. S. Civil Right Commission, (November, 1965), pp. 94-97; RA 154-157; Appendix A.

The arresting officers were Officer Carson, a Negro veteran of 13 years on the force (RA 23) with the rank of detective; Officer Martin, a Negro veteran of 4 and 1/2 years on the force.

Chief Burnley, 17 years experience on the force, a graduate of the FBI National Academy, and specially trained in riot control described the scene as a fast-moving, "erupting" situation which could have got out of hand at any second, any minute (RD 57). He stated:

> "I was of the opinion that the situation was very tense. That at any minute we could have a riot or some violence to take place at that particular gathering."

RA 55.

Captain Tackett, a veteran of 13 years and an FBI graduate, stated "It seemed as though they were going to try and take the situation into their own hands." (RA 46) As he saw it, the temper of the crowd was increasingly worsening, and, in his opinion, "if the trend had of kept (up) there would have been some violence there." (RA 52)

Petitioners' brief (pp. 11, 19) seems to give the impression that after their arrest, the crowd peacefully dispersed. This is not in accord with the facts in the record. After petitioners' arrest, a short time was allowed for a voluntary dispersal of the crowd. It did not. Chief Burnley then ordered the crowd to disperse. It did not. (RC 44, 45). In point of fact, it became necessary for a detail of 15-18 officers to form a line in riot squad formation (RA 56, RB 44), to march into the crowd and compress it into a column of two's and three's, and then to bodily escort that crowd a distance of 12-15 blocks, out of the business district, where it was then dispersed. (RA 47, 48)

On the other hand, the inflammatory language admittedly used by petitioners—"Are you going to stand for segregation?" "Are you going to take it?" "Are you going to stand for this?" "Are you going to let them arrest my buddy?" "This is everybody's fight" "Let's all go to jail"—to a crowd that was upset, emotional, shocked, charged with restless energy and "only needing a leader," clearly supports all four jury verdicts finding that petitioners were guilty of conduct calculated to provoke a breach of the peace or reasonably leading to a breach of the peace.

REPLY TO REASONS FOR GRANTING THE WRIT

I

Petitioners were not engaged in any federally protected activity at the time of their arrests.

Petitioners rely principally on three cases to support their proposition that they were arrested because of the exercise of their "federal constitutional rights of free speech, assembly and petition:" *Terminiello v. Chicago,* 337 U. S. 1 (1949); *Edwards v. South Carolina,* 372 U. S. 229 (1963); and *Cox v. Louisiana,* 379 U. S. 536 (1965). All three cases are clearly distinguishable on the facts and in the principles involved.

In *Terminiello,* the case grew out of an address delivered in a capacity auditorium under the auspices of the Christian Veterans of America. Outside there was a larger, turbulent and angry crowd gathered to protest the meeting. Petitioner had been fined for disorderly conduct. The *trial court* had charged the jury that

> "* * * 'breach of the peace' consists of any 'misbehavior which violates the public peace and decorum'; and that the 'misbehavior may constitute a breach of the peace if it stirs the public to anger, invites dispute, brings about a condition of unrest, or creates a disturbance, or if it molests the inhabitants in the enjoyment of peace and quiet by arousing alarm.'"
>
> 337 U. S. 1, 3.

As Mr. Justice Douglas succinctly put it, "the pinch of the statute is in its application." (337 U. S. at 6) The Court there correctly held that the statute, so construed, seriously invaded the province of First Amendment rights.

In all four cases presently before this Court, the trial court instructed the jury for the defendants (petitioners) that

> "* * * if you find that the defendant was arrested for peaceful protest against racial segregation, then you cannot find the defendant guilty."
>
> RA 9, RB 14, RC 9, RD 14.

Thus the jury was squarely presented a factual issue of whether petitioners were arrested and prosecuted because they were advocating unpopular views, or whether they were arrested and prosecuted because their conduct was calculated to or likely to provoke a breach of the peace.

The case of *Bolton v. City of Greenville*, 253 Miss. 656, 178 So2d 667 (1965) and *Bynum v. City of Greenville*, 253 Miss. 667, 178 So2d 672 (1965) were appeals from convictions of the girls who were being tried at the time petitioners were arrested. Their cases argued to the Supreme Court of Mississippi on the same day as petitioners' cases. In *Bolton* and *Bynum*, the girls' convictions were reversed in a unanimous decision on the reasoning that they were engaged in conduct which, although unpopular enough to very nearly cause a riot, was not illegal. These cases are alluded to in the Mississippi Supreme Court's opinion (Petitioners' Brief, Appendix 11a; 187 So2d 854, 859), and this distinction carefully drawn.

As stated in the opinion below of the Mississippi Supreme Court,

> "* * * This Court is fully cognizant of our duty to construe our statutes in such a manner to be sure they will not infringe upon the constitutional rights of any person. The statue (§2089.5) as construed by the trial court is not unconstitutional.

187 So. 2d at 859; Petitioners' Brief, Appendix 11a.

We suggest that it is unlikely the same Court which unanimously reversed *Bolton* and *Bynum* would unanimously affirm petitioners' convictions, had petitioners, like the girls, been engaged in the exercise of constitutional rights.

In *Edwards*,

> "* * * The City Manager testified that he recognized some of the onlookers, whom he did not identify, as 'possible troublemakers,' but his subsequent testimony made clear that nobody among the crowd actually caused or threatened any trouble."

372 U. S. at 231.

It can be said with some degree of certainty that the facts in *Edwards* establish a situation where the defendants were exercising First Amendment rights, and where there was no clear and present danger of violence.

Similarly, in *Cox*, this Court stated

> "* * * but our independent examination of the record, which we are required to make, shows no conduct which the State had a right to prohibit as a breach of the peace."

379 U. S. at 545.

As more fully covered in the Supplemental Statement above, and in Point II, below, both *Cox* and *Edwards* are distinguishable on the facts. The crucial distinction is that in those two cases the defendants were acting peacefully and were engaged in activities protected by the First Amendment (Cf. *Bolton v. City of Greenville, supra*). In the case at bar, petitioners had passed the bounds of argument or persuasion, and undertaken to incite the crowd to riot. This is not constitutionally protected action.

II

There is ample evidence of petitioners' guilt in the record to support their conviction.

As we view this controversy, we are dealing strictly with a question of fact. Petitioners' position is that they were attempting to persuade the crowd to qualify as voters and exercise rights as citizens. In their petition, they state it thusly:

> "* * * Petitioners intended to stir persons in the crowd to action, viz., assertion of their federal rights. * * *"
>
> Petition, p. 15.

Respondent's position is that petitioners' conduct was intended to (i. e., "calculated to") provoke disorder (i. e., a breach of the peace), and that petitioners were arrested as a necessary step to avert a riot.

In considering this question, this Court will make its independent examination of the records to determine whether petitioners' First Amendment rights have been violated. We do not quarrel with this; we welcome the investigation.

Nevertheless, at the outset of this examination, we feel this Court should take note of action at various levels of these cases:

(1) In the City Court, petitioners were tried on the merits without a jury. The City Judge found them guilty.

(2) In the county court, petitioners were tried *de novo* before four separate juries. Each jury was instructed by the County Court that if they believed petitioners were arrested for a peaceful protest against racial discrimination, they should be found not guilty. Each jury convicted.

(3) Although it is true that two juries were all white, it is also true that the other two juries contained enough Negroes as jurors to impel petitioners to move to quash the panel on the ground Negroes had been systematically included.

(4) The resisting arrest cases required a second conviction on the breach of the peace charges as a condition precedent to a finding of guilty; therefore, both juries found petitioners guilty of conduct calculated to provoke a breach of the peace independently of the first two jury findings.

(5) All four cases were reviewed on the record by the County Court and Circuit Court of Washington County with an exceptionally able judge (Hon. Arthur B. Clark, Jr., Harvard Law School, LLB 1948), and the convictions affirmed.

(6) All four cases were carefully considered by the Supreme Court of Mississippi, which was thoroughly cognizant of petitioners' constitutional rights, but which had no difficulty in concluding that "The arrest of appellant (McLaurin) and the subsequent arrest of Charles Cobb enabled the officers to control a situation that otherwise might have created a riot beyond control."

Petition, Appendix 12a; 187 So2d at 859.

In disposing of petitioners' contention that there was no evidence of guilt, that Court held:

> "Appellant's contention that there was no evidence of appellant's guilt of the charge is without merit. This contention is based solely upon the proposition that appellant's acts were constitutionally protected, and we hold that they were not for the reasons heretofore stated."
> Petition, Appendix 13a; 187 So2d at 860.

Without restating the detailed facts, let us examine the evidence directly bearing upon the evidence of guilt. In so

doing, we recall, but cannot locate the citation, where Mr. Justice Cardozo, considering what was "reasonable," said substantially that it was like a "jewel which varies in color and content with its setting."

In examining this precise question, this Court should be governed by the ground rules laid down by Mr. Justice Holmes in *Schenk v. U. S.*, 249 U. S. 47, 52-53 (1919), where he said:

> "* * * The most strigent protection of free speech would not protect a man in falsely shouting fire in a theater, and causing a panic. It does not even protect a man from an injunction against uttering words that may have all the effects of force. (Citation omitted) The question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to protect. It is a question of proximity and degree."

The question here, therefore, is whether the words used by the petitioners are used in such circumstances and are of such a nature as to create a clear and present danger of a riot or breach of the peace.

Let us first examine the circumstances. This was an abnormally large crowd for the Municipal Court (RD 54), assembled for the trial of two girls arrested for a park demonstration. It is a fair inference that petitioners' activities were responsible for the size of that crowd. After the trial, where both girls had been convicted, the crowd quietly leaving the courtroom and dispersing. The crowd was tense, upset, shocked. As described by petitioner McLaurin, "They were upset; they were restless. The expressions on their faces characterized by restless energy, that they felt something should be done.

But, then all it needed was a leader." (RB 58, emphasis added)

Petitioners' counsel inadvertently correctly and aptly described the crowd as a "mob." (RB 51) This designation was used by a skillful and capable lawyer. It means:

> "MOB. An assemblage of many people, acting in a violent and disorderly manner, defying the law, and committing or threatening to commit, depredations upon the property or violence to persons. (Citations omitted)
>
> "The word, in legal use, is practically synonymous with 'riot' but the latter is the more correct term."
>
> *Black, Law Dictionary* (4th Ed., 1951), 1154.

Taking petitioners' language in this context, regardless of what they "meant" or "intended to say", what they actually said can only be construed to be inflammatory. As petitioners' counsel puts it,

> "* * * What petitioners did succeed in saying merely amounted to a call to action; but nowhere in the record is there any indication that it was a call to unlawful action."
>
> Petition, p 16.

Under the circumstances then and there existing, with an emotional, upset, shocked crowd, with the "expressions on their faces characterized by restless energy", the language used by McLaurin (What are you going to do about it? Are you going to stand for this?"), and the language used by Cobb (Are you going to let them arrest my buddy? This is everybody's fight! Let's all go to jail![1]) is the precise equivalent to

---

[1]) Cf. **Adderley v. Florida**, — U. S. —, 35 LW 4013, 4015 (14 Nov. 1966) where some of the petitioners "apparently wanted to get themselves put into jail too."

shouting "fire" in a crowded theater.

The undisputed testimony is that before petitioners' harangues, the crowd was peacefully dispersing and departing from the area. After the harangues, they disobeyed the orders of the Chief of Police to disperse, and it became necessary to form 15-18 officers into a riot formation, compress the crowd into a column of two's and three's, and to march them 12-15 blocks out of the business district.

We respectfully suggest that the affirmative findings of the City Judge and of four separate juries may not be lightly dismissed. They have the advantage of having heard the testimony *viva voce*, and of having had an opportunity to observe the demeanor and manner of speech of the witnesses, and to better judge the truth where there is a conflict.

We submit that the evidence in this record compels a finding that there was a clear and present danger of civil disorder which could be averted only by removal of petitioners from the scene.

Petitioners argue:

> "* * * Nor can this Court accept at face value the unsupported assertions of police witnesses that an imminent danger of breach of the peace existed."
>
> Petition, p. 19.

We respectfully suggest that this Court cannot ignore police testimony merely because it is police testimony. This is particularly true here. As appearances for petitioners disclose, their defense is provided by the NAACP Legal Defense and Educational Fund, Inc. In *A Report on Equal Protection in the South, supra*, the U. S. Civil Rights Commission quotes

James Edwards, chairman of the local NAACP as follows:

> "* * * When Negro leaders from Greenville appeared before the Commission, they were unanimous in expressing confidence in their local law enforcement officials. James Edwards, chairman of the local NAACP, testified that the attitude of the Negro community towards law enforcement was 'good' and that Negroes believed 'we have one of the best police forces in the State, one of the best police forces you will find. . .'
>
> "The confidence of the Negro community in Greenville police can be attributed to the determination of city officials to have *impartial and professional law enforcement.*"

Id. at 94-95; RA 154-155 (Emphasis added).

We submit this suggests that testimony of the officers, which petitioners do not deny (RB 66), should be accepted at face value.

Looking at the other side of the coin, whether petitioners' testimony is worthy of belief, we understand their contention to be that the content of their speeches was encouragement of voter registration, and that they were arrested for presenting these views to the crowd, and unpopular views.

We should like to make two observations we believe pertinent:

(1) Presumably the crowd of 200-300 persons, having been brought to the trial in support of the SNCC efforts, would have been favorably disposed towards petitioners. Yet not one single witness, other than themselves, came forward to corroborate their versions of the speeches.

(2) Petitioners' testimony shows that Negroes applying to register for voting were meticulously given the same treat-

ment as whites; a substantial number of Negroes were qualified electors; not only was there no impediment to Negro qualification, but it was actually encouraged and facilitated by making poll tax payment possible at all banks, branch banks, and major communities in the county outside Greenville. Voter registration in the respondent city was not and is not a controversial issue. There would, therefore, be no reason why respondent's police would seek to prevent speeches aimed at encouraging registration and qualification as voters. It is also significant that petitioners, paid field secretaries for SNCC, had been active in the respondent city for about nine and one-half months without interference of any sort from respondent.

On the merits, and on the basis of any reasonable examination of the record in this cause, petitioners' arrest and conviction was justified.

III

§2089.5 of the Mississippi Code, as applied by the trial court, is constitutional.

Criminal statutes are no more and no less than rules adopted by a civilized society to establish a minimum standard necessary to preserve an ordered life. They provide a framework within which individuals may form a community without loss of basic individual rights.

They fall into two broad categories: (1) those forbidding acts which are *malum per se*, and (2) those which are *malum prohibitum*. This Court hints at this distinction in *Dombrowski v. Pfister*, 380 U. S. 479, 491-492 (1965), in referring to "the sort of 'hardcore' conduct that would obviously be prohibited under any circumstances."

Thus, under the first category, murder, rape, robbery, rioting, provoking public disorder and similar acts would be a firm basis for criminal prosecution no matter how loosely worded the statute. The second category, where acts which were formerly acceptable conduct in the community become prohibited, requires that the statutes be spelled out with sufficient certainty to give fair warning to citizens of the shift in classification from legal to illegal. The "void for vagueness" doctrine should be limited in its application to statutes which are in the category of *malum prohibitum*, with the qualification always that an otherwise valid statute not be so applied as to impinge upon rights guaranteed by the constitution.

As Mr. Justice Douglas so aptly put it, "The pinch of the statute is in its application."

Terminiello v. Chicago, 337 U. S. 1, 6 (1949).

Thus in *Terminiello*, this Court reversed because the trial court had given an overly broad interpretation of the statute there involved to permit conviction for speech which invited dispute. In *Edwards v. South Carolina*, 372 U. S. 229 (1963), this Court reversed a conviction for breach of the peace where there was no violence or threat of violence. In *Ashton v. Kentucky*, —— U. S. ——, 16 LEd2 469 (1966), this Court reversed a conviction for criminal libel on the ground that the overly broad and vague construction of the crime given the jury by the trial court could not be cured by a more limited construction of the Kentucky Court of Appeals. In *Cox v. Louisiana*, 379 U. S. 536 (1965), this Court reversed a breach of the peace conviction where the statute, as construed by the trial court, allowed punishment for peacefully expressing unpopular views. However, significantly, in *Cox*, this Court held:

"From these decisions certain clear principles emerge. The rights of free speech and assembly, while fundamental in our democratic society, still do not mean that everyone with opinions or beliefs to express may address a group at any public place and at any time. *The constitutional guarantee of liberty implies the existence of an organized society maintaining public order, without which liberty itself would be lost in the excesses of anarchy.*"

379 U. S. at 554 (Emphasis added).

Cox was followed by *Greenwood, Mississippi v. Peacock*, —— U. S. ——, 16 LEd2 944, 956 (1966), where the Court stated:

"* * * First, no federal law confers an absolute right on private citizens — on civil rights advocates, on Negroes, or on anybody else — to obstruct a public highway, to contribute to the delinquency of a minor, to drive an automobile without a license, or to bite a policeman. Second, no federal law confers immunity from state prosecution on such charges."

These examples, hardcore offenses, would surely include, in principle, provoking a breach of the peace, inciting to riot, or precipitating violence.

The latest pronouncement of this Court is in *Adderley v. Florida*, — U. S. —, 35 LW 4013, (14 November 1966), which involved trespass convictions arising out of demonstrations at the jailhouse where it was argued:

"* * * that they (petitioners) had a constitutional right to stay on the property, over the jail custodian's objections, because this area chosen for the peaceful civil rights demonstration was not only "reasonable" but also

particularly appropriate. . . .' Such an argument has as its major unarticulated premise the assumption that people who want to propagandize protests or views have a constitutional right to do so whenever and wherever they please. That concept of constitutional law was vigorously and forthrightfully rejected in two of the cases petitioners rely on, *Cox v. Louisiana*, supra, at 554-555 563-564. We reject it again."

35 LW at 4016.

In the cases at bar, petitioners argue they were convicted for peaceful protest against racial discrimination, and that their convictions therefore violate their First Amendment rights. The record clearly discloses that the trial court gave a limited and narrow construction to the statute by specifically instructing the jury that if they believed petitioners were arrested for such a peaceful protest, they must be found not guilty. The Supreme Court of Mississippi, in affirming, held:

"Appellant also urges that section 2089.5 is so vague and indefinite as to permit the punishment of the exercise of the right of free speech guaranteed by the Fourteenth Amendment to the Constitution of the United States. His argument is based upon the contention that as applied here the term 'breach of peace' reaches federally protected activities that create unrest in others. The statute as drawn is in broad terms, but is not unconstitutional on its face. It is true that it could be construed in such a manner that it would reach federally protected activities, but we are well aware of the fact that neither this statute nor any other statute may be construed so as to infringe upon the state or federally protected constitutional rights of appellant or any other person."

McLaurin v. City of Greenville, — Miss. —, 187 So2d 854, 859, Petition, Appendix 11a.

In affirming, the Mississippi Supreme Court specifically held that the statute, *as construed by the trial court*, is not unconstitutional.

Thus the cases before this Court are instances where petitioners were convicted for conduct calculated to provoke a breach of the peace, or which might reasonably lead to a breach of the peace, and specifically not for a peaceful protest against discrimination which would be constitutionally protected. We submit, respectfully, that this appeal is governed by the decision of this Court in *Feiner v. New York*, 340 U. S. 315 (1951).

In *Feiner*, where this Court made its independent examination of the evidence to determine whether First Amendment rights had been violated, it stated:

> "* * * Our appraisal of the facts is, therefore, based upon the uncontroverted facts and, where controversy exists, upon that testimony which the trial judge did reasonably conclude to be true."

340 U. S. 316.

Here, the controversy is centered on whether petitioners were making a peaceful protest, or whether their conduct was calculated to or might reasonably have lead to a breach of the peace. The triers of fact were four separate juries, and the testimony reasonably supports their conclusions of guilt.

In *Feiner*, the offense charged was disorderly conduct, but the language of the statute involved is strikingly similar to that involved here. As set out in footnote 1 (340 U. S. at 318), the conduct condemned was that "with intent to provoke a

breach of the peace or whereby a breach of the peace may be occasioned." §2089.5 of the Mississippi Code condemns precisely the same conduct, and with substantially the same language.

In *Feiner,* where the defendants were tried before a judge without a jury, there was evidence supporting and contradicting the judgment of the police officers that a clear danger of disorder was threatened. His conclusion that the police officers were justified in taking action to avoid a breach of the peace was approved by two courts on review. Here, the City Judge reached the same conclusion. His judgment is supported by the verdicts of four separate juries, by the judgment of the County Court denying a motion for a directed verdict, by the review of the Circuit Court of Washington County, and by the review of the Supreme Court of Mississippi.

In *Feiner,* this Court pointed out that these judgments and reviews supported the proposition that the officers were motivated solely by a proper concern for the preservation of order and the protection of the general welfare,

> "* * * and that there was no evidence which could lend color to a claim that the acts of the police were a cover for suppression of petitioner's views and opinions. Petitioner was thus neither arrested nor convicted for the making or content of his speech. Rather, it was the reaction which it actually engendered."

340 U. S. at 319-320.

Here, there is no shred of evidence that petitioners were arrested or that the arrests were sanctioned because the police objected to what was being said or because they disagreed with petitioners' views on voter registration.

Cf. *Adderley v. Florida*, — U. S. —, 35 LW at 4015. Here, there had been no interference with petitioners' activities in the voter registration field, and there were no obstructions to Negro registration—if anything Negroes' qualification as electors is seen to be encouraged and facilitated. The issues petitioners now claim they were raising are not controversial issues in the respondent city; in fact such issues do not exist.

We respectfully submit that *Feiner* is on all fours with the cases here under consideration. Petitioners contentions are not supported by any independent evidence from members of the crowd or mob, nor by any evidence which remotely suggests that the respondent city has ever attempted to suppress unpopular views.

IV

Petitioner Cobb is not entitled to reversal of his convictions because of systematic exclusion of Negroes from the jury where the records affirmatively shows a legitimate basis for exercise of peremptory challenges on the first trial, and respondent's acceptance of all Negroes tendered as jurors on the second trial.

On the first trial, for breach of the peace, petitioner Cobb moved to quash the petit jury panel for systematic exclusion of Negroes. Following this motion, the record discloses this:

"*By Mr. Robertshaw:*

"Comes now the City of Greenville and shows for the record that eleven Negroes were served with summons for jury duty at this time; that one was exempted being a principal of a school, that one could not be found, that of the nine who were present in the Courtroom,

one was excused at his request for hardship reasons by the Court, and another was excused after having disqualifying (sic) himself for the reason that he could not read or write. The City would further show that of Negroes actually placed in the box, peremptory challenges were used for the reason that in the best judgment of the City in the light of the extensive publicity, it was the feeling that such jurors would be biased."

RC 25-26.

This statement discloses that a substantial proportion of Negroes were summoned for jury duty, and that the Negroes actually placed in the jury box were peremptorily challenged because of possible bias related to their group affiliations, not because of their race. This is an entirely proper use of peremptory challenges.

Swain v. Alabama, 380 U. S. 202 (1965), which controls on this point, specifically so held. Mr. Justice White, after pointing out that counsel must decide, not whether a juror of a particular race is in fact partial, but whether one from a different group is less likely to be, concluded:

"* * * Hence veniremen are not always judged solely as individuals for the purpose of exercising peremptory challenges. Rather they are challenged in light of the limited knowledge counsel has of them, which may include their group affiliations, in the context of the case to be tried."

380 U. S. at 221.

The pattern, if any, established by prosecutorial use of peremptories during part of a single week, is certainly not the "period of time" referred to by Justice White (380 U. S. at 227). In the second trial of petitioner McLaurin, the de-

fense moved to quash the panel on the ground of systematic *inclusion* of Negroes, and the defense exercised a peremptory challenge against a Negro juror (RB 23). In petitioner Cobb's second trial, he moved to quash the panel because of the systematic *"inclusion and/or exclusion"* (RD 25) of Negroes.

Thus the records before this Court affirmatively disclose that there was no systematic exclusion of Negroes on racial grounds. What transpired in the two cases against this petitioner is of far greater probative value than what may have happened in other cases.

Petitioner Cobb's position is entirely without merit. He seeks to travel in diametrically opposed directions at the same time. In the one case, he complains that peremptory challenges were exercised against Negroes for a perfectly proper reason; in the second case, he complains because respondent accepted Negro veniremen as they were called to the box where there was no valid challenge for cause.

CONCLUSION

Whether certiorari should be granted in this case is entirely within the discretion of this Court. What the petition presents to this Court is a pure question of fact, not a question of law. If the arrests were used by respondent for the purpose of suppressing a peaceful protest against racial discrimination, then we would agree that the convictions should be reversed and petitioners discharged. On the other hand, if the arrests were made for the sole purpose of averting civil disorder, then the case is governed by *Feiner v. New York, supra,* and certiorari should not be granted for the reason there is no new principle of law involved.

We respectfully submit that the findings of the City Judge in the initial trial, and of four separate juries in the County Court to the effect that petitioners were not arrested for any such peaceful protest, reviewed in turn by the County Judge, by the Circuit Judge, and by the Supreme Court of Mississippi, are amply supported by the evidence, and should not be disturbed.

Respectfully submitted,

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THE STATE OF MISSISSIPPI
COUNTY OF WASHINGTON

Personally appeared before me, the undersigned authority in and for the state and county aforesaid, J. ROBERTSHAW, who, being first duly sworn, states on oath that he has this date mailed three copies, each, of the foregoing Reply Brief for Respondent, via United States airmail, postage prepaid, to attorneys for petitioners addressed as follows:

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J. ROBERTSHAW

SWORN TO AND SUBSCRIBED before me this 5th December, A. D. 1966.

Nancy Reed
NOTARY PUBLIC

My commission expires 5-31-67

APPENDIX A

Extract from *A Report on Equal Protection in the South*, U. S. Civil Rights Commission (November 1965).

GREENVILLE—A CONTRAST

The contribution that community support for impartial law enforcement, a professional police force, and firmly expressed intentions to enforce the law can make towards preventing racial violence was revealed in the Commission's study of Greenville, Mississippi. Greenville is the county seat of Washington County and the fourth largest city in Mississippi. When Negro leaders from Greenville appeared before the Commission, they were unanimous in expressing confidence in their law enforcement officials. James Edwards, chairman of the local NAACP, testified that the attitude of the Negro community towards law enforcement was "good" and that Negroes believed "we have one of the best police forces in the State, one of the best police that you will find. . . ."[46]

The confidence of the Negro community in Greenville police can be attributed to the determination of city officials to have impartial and professional law enforcement.

The chief of police, William C. Burnley, Jr., had served as a law enforcement officer in Greenville for 25 years and is a graduate of the FBI National Academy. Members of extremist groups were not permitted to join the police department, and

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43 The prosecuting attorney is elected by the county or the district. Miss. Code §§3910, 3920 (1956).

44 Miss. Code §§ 3836-41 (1956); Brookings Institution, op. cit. supra note 9, at 821-23. See also Highsaw and Fortenberry, op. cit. supra note 25, at 162-64.

45 Brookings Institution, op. cit, supra note 9, at 471.

46 T. 283. Edwards added, "We are sorry we can't say the same for the sheriff's force . . . " Ibid.

this policy was enforced by means of FBI checks of recruits and lie detector tests. Burnley's entire immediate staff (seven officers) have attended the FBI National Academy. Other officers have received training as detectives. Unlike other police forces in Mississippi, since 1950 the Greenville police force has included Negro officers. At the time of the Commission's hearing there were seven Negro police officers and several Negro crossing guards.[47]

In the spring of 1964, when many Mississippi communities feared violence because of the announced arrival of civil rights workers, officials in Greenville took steps to prevent trouble. The mayor and the city council issued statements which underlined the city's determination that law and order would prevail.[48] Mayor Dunne told the Commission, "This we meant and the people knew that we meant it."[49] The city's position was supported by public statements from citizens' groups in Greenville and by the local newspaper.[50]

The police displayed a similar attitude. Police Chief William C. Burnley, Jr., began a program of orientation and training for his officers in which he stressed their duty to enforce the law fairly and to prevent incidents of violence. The chief told his men that the policy would be, "Arrest no person regardless of who they are or what group they belong to unless they violated the law."[51] Those who felt they could not accept this policy were invited to leave the department. The police chief and other officials also took steps to advise themselves fully of the membership and activities of the Klan and similar organizations.[52]

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47 Testimony of Chief Burnley, T. 299.
48 T. 294.
49 Ibid.
50 T. 284, 289.
51 T. 297.
52 Ibid.

The community was apprised in April 1964 of police determination to prevent violence. When the Ku Klux Klan, in a show of strength, burned crosses in communities throughout Mississipi, Greenville was the only place where the persons responsible for cross-burnings were arrested and prosecuted. Later, when civil rights workers arrived in the community, there were no incidents of violence against them, nor was a single worker arrested by the Greenville police on any charge.[53]

On August 10, 1964, a white attacked a Negro, and, in a separate incident, a Negro attacked a white. Arrest were made almost immediately in both cases and identical fines imposed.[54] Following these incidents, Police Chief Burnley issued a statement:

> The issue with us is not which race assaults the other, but rather the idea of professional law enforcement. We intend to enforce the laws of the state and city as written without regard to one's station in life. This is the only way that peace and order can be obtained and continued.[55]

Chief Burnley testified at the hearing that his policy received "tremendous support from the community," and that without such support he believed his effectiveness would have been greatly diminished.[56] Two leading members of the white community, Albert Lake and Leroy Percy, testified that they thought that the business and professional community contributed to the quality of law enforcement in the city of Greenville. As Mr. Lake commented, "Voluntary groups . . . have

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53 T. 298.
54 Ibid.
55 Delta Democrat-Times (Greenville, Miss.), August 12, 1964, p. 4.
56 T. 298.

basically operated to give support to the governing body of the city and to the police force and to see that law and order was maintained."[57] Mr. Percy expressed a similar view:

> I think the basic reason for Greenville being the community that it is, is this: there has been a long history of responsible citizens willing to participate in local government, not only to involve themselves in voting and getting the vote out, but to serve as city councilmen, as members of the school board and so forth. I think that is basic.[58]

In other parts of the State local citizens did not publicly express their opposition to violence and their support of impartial law enforcement until extensive violence had already occurred. In McComb, violence continued for five months before local citizens issued the "Statement of Principles"[59] In Natchez, although a statement was prepared shortly after a series of whippings in February 1964, it was not published until October.[60] In February 1965 the Mississippi Economic Council (the State's chamber of commerce) issued a statement urging compliance with Federal law.[61]

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57 T. 289.
58 Ibid.
59 See pp. 38-41, supra.
60 See pp. 20-21, supra.
61 T. 379. Mr. Brumfield, of McComb, testified that the Mississippi Manufacturers Association, the Mississipp Association of Supervisors, and the Mississippi Sheriffs Association issued statements similar to the one in McComb. T. 49.

CONCLUSIONS

In many areas of Mississippi the failure of law enforcement officials to curb racial violence is largely attributable to the racially hostile attitudes of sheriffs, police chiefs, and prosecuting attorneys.

Law enforcement officers openly displayed racial hostility in many communities. In addition, failure to make prompt arrests, to take a firm stand against violence, and to announce an intention to punish law violators undoubtedly encouraged vigilantes to feel they could operate with impunity.